FEDERAL RULES OF EVIDENCE

HR 5463, 93d Cong.

COMMENTS OF STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND ADVISORY COMMITTEE ON RULES OF EVIDENCE ON AMENDMENTS PROPOSED BY HOUSE SUBCOMMITTEE ON CRIMINAL JUSTICE (Committee Print June 28, 1973)

On July 18 and 19, 1973 the standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States met in joint session for the purpose of considering amendments to the Federal Rules of Evidence proposed to be incorporated in HR 5463, 93d Cong. by the House Subcommittee on Criminal Justice (Committee Print June 28, 1973). The two committees fully considered all of the proposed amendments as well as the Subcommittee Notes in explanation of them and agreed upon the following comments thereto:

RULE 104

(c) Hearing of jury.—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require *or, when an accused is a witness, if he so requests.*

The committees express no disagreement with the proposed amendment to subdivision (c).

RULE 105

[Rule 105. Summing Up and Comment by Judge

[After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.]

The committees are unable to agree with the proposal to delete this rule. It is believed to embody a constitutional mandate, Capital Traction Co. v. Hof, 174 U.S. 1 (1899), which it is useful to set forth in these rules. Since the rules are to be enacted by the Congress, considerations of whether the matter involves procedure or evidence are lacking in importance. Incorporating the principle in these rules is simpler than amending both the Civil and Criminal Rules.

RULE 201

Rule 201. Judicial Notice [of Adjudicative Facts]

[(a) Scope of rule.—This rule governs only judicial notice of adjudicative facts.]

[(b)](*a*) Kinds of facts.—A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[(c)](*b*) When discretionary.—A judge or court may take judicial notice, whether requested or not.

[(d)](*c*) When mandatory.—A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

[(e)](*d*) Opportunity to be heard.—A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

[(f)](*e*) Time of taking notice.—Judicial notice may be taken at any stage of the proceeding.

[(g) Instructing jury.—The judge shall instruct the jury to accept as established any facts judicially noticed.]

The committees are sympathetic to the Subcommittee's dissatisfaction with the term "adjudicative." It is believed, however, that a basic and fundamental difference exists between the historical facts of the particular litigation and social, economic, and scientific data that enter into the lawmaking process, whether by legislature or courts. The former have always been thought to demand a high measure of certainty, while the latter have been treated on the same basis of informality as has governed ascertainment of what the law generally is or ought to be. The deletion of subdivision (a) of the rule would leave both kinds of facts equally subject to the very narrow confines of subdivision (b), a situation in which the judicial system could scarcely function. See, for example, the Hawkins case, discussed in the Advisory Committee's Note, as an illustration of the liberality traditionally found with respect to judicial notice of "legislative" facts. The charge imposed upon the judiciary by proposed amended Rule 501, to interpret the common law in the light of reason and experience, would face a virtually insurmountable obstacle in the amendment. The committees suggest a return to the language of the Preliminary Draft of 1969, with some amendment, so that subdivision (a) would read: "This rule governs judicial notice of facts in issue or facts from which they may be inferred. It does not govern judicial notice of matters of law." The expression "matters of law" is sufficiently broad to encompass "legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic

and social facts or findings or that indicate contemporary opinion, and similar materials." Cal. Ev. Code 1965, §450, Comment. The rule would not, of course, bar the judiciary from considering such matters when appropriate but would simply free them from the restraints of the rule.

The committees believe that subdivision (g) should be retained for the reasons set forth in the Advisory Committee's Note. The objection taken in the Subcommittee Note is believed to be met by the provisions of subdivision (e) of the rule; if at any time counsel has evidence showing that a judicially noticed matter is subject to reasonable dispute, the judge can take appropriate remedial measures as in other situations where he determines that an earlier ruling was erroneous in light of subsequent developments.

RULE 301

Rule 301. Presumptions in General *in Civil Actions*

In all *civil* [cases] *actions* not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

The substitution of "civil actions" may have the unintended effect of excluding proceedings and cases in bankruptcy from the application of the rule. Proceedings in bankruptcy are not regarded as "actions" and the civil rules which do apply to civil actions, do not apply to bankruptcy proceedings except as made applicable by the bankruptcy rules. Compare Evidence Rule 1101(b), which

distinguishes between civil actions and proceedings and cases under the Bankruptcy Act.

RULE 302

Rule 302. Applicability of State Law in Civil [Cases] *Actions*

In civil actions, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

The caption should be restored and the text amended to read "cases" in lieu of "actions." In this instance the text of Rule 302 as transmitted to the Congress is in error. See comment to Rule 301, above.

RULE 303

[Rule 303. Presumptions in Criminal Cases

[(a) Scope.—Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

[(b) Submission to jury.—The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

[(c) Instructing the jury.—Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.]

Subcommittee Note

Rule 303 was deleted since the subject of presumptions in criminal cases is dealt with in the proposals of the Brown Commission and S. 1 to revise the criminal code. The Subcommittee determined to consider the issue in the course of its study of these proposals, commencing later this Congress.

The committees recognize that the decision to defer consideration represents a legislative procedural determination.

RULE 402

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority*. Evidence which is not relevant is not admissible.

The committees express no disagreement with the language of the amendment.

RULE 404

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. [This subdivision does not exclude the evidence when offered] *It may, however, be admissible* for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The committees express no disagreement with the amendment to subdivision (b).

RULE 405

(b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct.

Subcommittee Note

The Subcommittee approved subdivision (b) as proposed by the Court with the specific understanding that the Rule applies only in those relatively rare situations where character is truly an issue in the case.

The committees agree with the interpretation of subdivision (b) set forth in the Subcommittee Note.

Rule 501. [Privileges Recognized Only as Provided] *General Rule*

[Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.]

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience: Provided, That in civil actions, with respect to a claim or defense as to which State law supplies the rule of decision the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Believing that privileges in the federal courts should be uniform and governed by federal law, the committees are unable to concur with the treatment given privilege by the Subcommittee. While Rules 502-513 if enacted as prescribed by the Court would no doubt make for uniformity in criminal prosecutions, federal question cases, and generally in bankruptcy, the proposed amendment injects an element of doubt. Experience under Rule 26 of the Criminal Rules offers small encouragement for the evolution of a comprehensive and uniform scheme of privileges through the decision-making process. It is hoped that the Subcommittee considers its general approach to privileges no more than a temporary expedient and proposes to return to the subject.

For the reasons set forth in the Advisory Committee's Note to Rule 501, the committees are also unable to agree with

the amendment's particularized treatment of privileges in diversity cases. In brief, the amendment would leave privileges created by State law in the peculiar posture of being effective in diversity cases but ineffective in other federal cases, notably in criminal cases which undoubtedly lie in the area of greatest sensitivity. With these privileges thus rendered largely illusory, their limited recognition is explainable only in terms of possible impact on the outcome of litigation, a result which has been rejected generally elsewhere in the federal procedural field.

RULE 601

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. *However, in civil actions, with respect to a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.*

The committees are unable to concur in the amendment. Rules governing the competency of witnesses are essentially legal formulations of credibility, and credibility seems undeniably to be a matter of procedure. To the extent that they are designed to affect outcome, the same is true of procedural provisions generally. The Erie argument thus fails to convince. Moreover, the amendment applies all State rules of competency, not merely those found in the Dead Man's Acts. In this respect it goes beyond the expressions received by the Advisory Committee.

A nationwide study of Dead Man's Acts was made for the Advisory Committee. While the study disclosed wide adherence to the philosophy that the estates of decedents ought to be protected against legal attacks based on perjured testimony, the implementation of this sentiment assumed so great a variety of forms as to lead inescapably to the conclusion that failure is a foregone conclusion. The study was too extended to permit its inclusion in the Advisory Committee's Note, but it has been made available to the Subcommittee. The committees believe that any encouragement of the perpetuation of this remnant of the common law rule of incompetency of parties and interested persons is a disservice to the law of evidence.

Note should also be taken of the fact that the amendment is a step backward from present Civil Rule 43(a), which would be supplanted.

RULE 606

(b) Inquiry into validity of verdict or indictment.— Upon an inquiry into the validity of a verdict or indictment, a juror may not testify [as to any matter or statement occurring during the course of the jury's deliberations or to] *concerning* the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith [except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror]. Nor may his affidavit or evidence of any statement by him [concerning a matter about which he would be precluded from testifying] *indicating an effect of this kind* be received *for these purposes.*

While the committees are satisfied with subdivision (b) as transmitted to the Congress, the difference between it and the amendment is believed not to be great enough to warrant disagreement with the amendment.

RULE 608

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, *in the discretion of the court*, if probative of truthfulness or untruthfulness [and not remote in time], be inquired into on cross-examination of the witness [himself] or on cross examination of a witness who testifies to his character for truthfulness or untruthfulness] *(1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.*

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

The committees express no disagreement with the amendment to subdivision (b).

RULE 609

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible *if*, but only if [the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2)] *(1) the crime* involved dishonesty or false statement [regardless of the punishment], *or (2) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction.*

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of *conviction or of* the release of the witness from confinement [imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction], whichever is the later date.

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(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The judge may, however, *in a criminal case*, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

The committees express no disagreement with the amendments to subdivisions (a), (b), and (d). Attention is, however, directed to a possible ambiguity in subdivision (a) with regard to whether the "unless" clause applies to both categories of crime or only to those in category (2). The problem could be avoided by reversing the two numbered categories, thus conforming clearly with the meaning expressed in the Subcommittee Note.

RULE 611

(b) Scope of cross-examination.—[A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.] *Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.*

(c) Leading questions.—Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. In civil [cases] *actions*, a party is entitled to call an adverse party or witness identified with [him] *such adverse party* and interrogate by leading questions.

With regard to subdivision (b), the committees reaffirm the treatment of scope of cross-examination set forth in the rule as transmitted to the Congress but recognize the existence of a substantial division of opinion in the profession.

With regard to subdivision (c), see the comment on Rule 301, above.

RULE 612

Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, [either before or while testifying] *either*—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice.

an adverse party is entitled to have [it] *the writing* produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in his discretion determines that the interests of justice so require, declaring a mistrial.

The committees recognize that resistance has been encountered with regard to the treatment of documents consulted by a witness prior to taking the stand in the rule as transmitted to the Congress. The amendment appears to be an acceptable compromise of the competing interests at stake, and the committees express no disagreement with it.

RULE 801

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him: *Provided, That a prior inconsistent statement under clause (A) shall not be admissible as proof of the facts stated unless it was given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury*; or

The amendment would virtually destroy the utility of clause (d)(1)(A), which allows prior inconsistent statements to be used as substantive evidence. The instances in which the rule as proposed to be amended would operate would be relatively few in number, because, the prior statement having been made under oath, the threat of a perjury charge would make it highly unlikely that the witness would subsequently relate a different story on the stand, again under oath. The problem area consists of cases in which the prior statement

was not under oath, and a rule which fails to encompass those cases is of slight practical significance.

The first of the two justifications given for the amendment in the Subcommittee Note is that "unlike in other situations, there can be no dispute as to whether the prior statement was made." The underlying assumption appears to be that some factor is present with regard to prior inconsistent statements that requires an extraordinarily high degree of assurance that the statement was in fact made. The nature of this factor is not, however, explained. Presumably the assurance would take the form of a written transcript of testimony, yet the amendment requires none, and it is well established under existing law that former testimony may be proved by the testimony of any person who was present and heard it given. Indeed, many out-of-court statements are now admissible without any requirement that they be in writing. Among them are admissions, including confessions, spontaneous utterances, statements for purposes of diagnosis or treatment, declaration of pedigree, reputation of various kinds, dying declarations, and declarations against interest, as well as former testimony.

The second justification given in the Subcommittee Note for the amendment is that "the context of a formal proceeding and an oath provide firm additional assurances of the reliability of the statement." The premise of the rule as transmitted to the Congress is that sufficient assurances

are already present in the circumstances, without the addition of the further highly limiting provisions of the amendment. If the premise of the amendment is that a statement not made under penalty of perjury is insufficient standing alone to support a conviction and ought therefore not to be admitted, a confusion between the distinct concepts of sufficiency and admissibility is present. If every item of evidence were required to be sufficient to sustain a verdict in order to be admissible, few items, particularly of circumstantial evidence, would ever be admitted. No one claims that this is so. See Advisory Committee's Note to Rule 401. Moreover, of the many kinds of hearsay admitted in evidence, only one, former testimony, is given under oath.

Prior to its action in prescribing the rule, the Supreme Court had occasion to examine a similar provision in the California Evidence Code. While the specific issue before the Court was whether the provision violated the constitutional right of confrontation, the Court's treatment of that question is equally applicable to the question whether a rule of this kind represents a wise approach to the problems of hearsay as a matter of policy. The Court said:

> ...Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [11]

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[11] 5 Wigmore §1367.

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(3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections. If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury; indeed, the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy—an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth.

Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant. We cannot share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement. The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth." State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939). That danger, however, disappears when the witness has changed his testimony so that, far from "hardening," his prior statement has softened to the point where he now repudiates it. [12]

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[12] See Comment, Substantive Use of Extrajudicial Statements of Witnesses Under the Proposed Federal Rules of Evidence, 4 U.Rich.L.Rev.110, 117-118 (1969); 82 Harv.L.Rev.475 n.16 (1968).

The defendant's task in cross-examination is, of course, no longer identical to the task that he would have faced if the witness had not changed his story and hence had to be examined as a "hostile" witness giving evidence for the prosecution. This difference, however, far from lessening, may actually enhance the defendant's ability to attack the prior statement. For the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event. Under such circumstances, the defendant is not likely to be hampered in effectively attacking the prior statement, solely because his attack comes later in time.

Similar reasons lead us to discount as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story. The defendant's confrontation rights are not violated, even though some demeanor evidence that would have been relevant in resolving this credibility issue is forever lost.

It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we see it must be not whether one can somehow imagine the jury in "a better position," but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence[13] nor reason

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13 The California Supreme Court in its earlier decision on this issue stated that "[t]his practical truth [the importance of immediate cross-examination] is daily verified by trial lawyers, not one of whom

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would willingly postpone to both a later date and a different forum his right to cross-examine a witness against his client." People v. Johnson, 68 Cal. 2d 646, 655, 441 P.2d 111, 118 (1968), cert. denied, 393 U.S. 1051 (1969). The citations that follow this sentence are to books on trial practice that shed little empirical light on the actual comparative effectiveness of subsequent, as opposed to timely, cross-examination. As the text suggests, where the witness has changed his story at trial to favor the defendant he should, if anything, be more rather then less vulnerable to defense counsel's explanations for the inaccuracy of his former statement.

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convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.

California v. Green, 1970, 399 U.S. 149, 158-161.

The committees are unable to express agreement with the proposed amendment.

RULE 802

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority* or by Act of Congress.

The committees express no disagreement with the language of the amendment. See comment under Rule 402.

RULE 803

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(6) Records of regularly conducted *business or professional* activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses,

made at or near the time by, or from information transmitted by, a person with knowledge, [all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness,] *if kept in the course of a regularly conducted business or professional activity, and if it was the regular practice of such business or professional activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.*

(7) Absence of entry in records [of regularly conducted activity] *kept in accordance with the provisions of paragraph (6).*—Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, [of a regularly conducted activity] *kept in accordance with the provisions of paragraph (6),* to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law, or (C) in civil [cases] *actions* and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

. . .

[(24) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.]

The committees are unable to agree with the amendment to subdivision (6) of the rule. The amendment limits records within this hearsay exception to those kept in the course of a "business or professional activity." This provision is much narrower than present 28 U.S.C. §1732(a), which uses the term "business" but defines it rather broadly to include "business, profession, occupation and calling of every kind." The joint committees believed that even this

definition was not sufficiently broad to meet present day needs. Compare the definition in subdivision (b) of 28 U.S.C. §1732.

Subdivision (7) of the rule would require revision to conform with action taken with regard to subdivision (6).

As to subdivision (8), see comment under Rule 301.

The committees are unable to agree with the proposal to delete subdivision (24). The common law developed the existing hearsay exceptions on a case-by-case basis, and this useful process should be permitted to continue. Neither the rulemaking nor the legislative process possesses the promptness and flexibility required to respond effectively to the immediate needs of a live case pending in the trial court. Compare the Subcommittee's proposal in amended Rule 501 that privilege be governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." A formulation of this sort might be included in subdivision (24) in lieu of deleting that subdivision entirely.

RULE 804

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability.—"Unavailability as a witness" includes situations in which the declarant—

. . .

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance *or testimony* by process or other reasonable means.

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity to develop the testimony by direct, cross, or redirect examination.*

[(2) Statement of recent perception.—A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.]

[(3)](2) Statement under belief of impending death.—[A] *In a prosecution for homicide or in a civil case, a* statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

[(4)](3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to [civil or] criminal liability [or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace,] that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless [corroborated.] *corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not admissible.*

. . .

[(6) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.]

The committees are unable to agree with the proposed amendment to subdivision (a)(5), requiring exhaustion of the possibilities of taking the deposition of the declarant. The most commonly encountered of the hearsay exceptions under this

rule is that for former testimony, which in appearance and reality is virtually indistinguishable from a deposition. The suggested additional requirement would compel the wasteful and needless redoing of what has already been done. Depositions are expensive and time-consuming, and the quality of the evidence under all the hearsay exceptions of this rule are such as to justify doing without this needless pretrial complication. In any event, deposition procedures are available for those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the proposed amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule 32(a)(3) and Criminal Rule 15(e) a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

The committees are unable to agree with the proposed amendments to subdivision (b)(1). A return to the older common law requirement of identity of the party against whom offered (or privity) is needlessly restrictive. Subjecting the evidence to a winnowing and sifting process by a party with like interests furnishes a guarantee of trustworthiness much like that found in declarations against interest. Modern authority supports this position. Tug Raven v. Trexler, 413 F.2d 536 (4th Cir. 1969) (testimony at Coast Guard inquiry admissible in wrongful death action); Cox v. Selover, 171 Minn. 216,

213 N.W. 902 (1927) (testimony against guarantor with corporate connections admissible against corporate guarantor); Bartlett v. Kansas City Public Service Co., 349 Mo. 13, 160 S.W.2d 740, 142 A.L.R. 666 (1942) (testimony for defendant in suit by husband admissible in suit by wife); Travelers Fire Ins. Co. v. Wright, 332 P.2d 417 (Okla. 1958) (testimony against one partner in criminal prosecution for arson admissible in action on fire policy by partners). In another respect, however, the amendment appears unduly lenient in failing to incorporate an equivalent of the common law requirement that the issues be identical or at least similar, with a view to insuring that there was adequate motivation to explore the testimony. In lieu of the mechanical method of the common law, the rule as transmitted to the Congress required that the party to the former proceeding have had a motive and interest similar to those of the party against whom subsequently offered.

The committees are unable to agree with the proposal to delete subdivision (b)(2). The subdivision is designed to avoid the loss of valuable evidence, which may be readily evaluated by a jury, and it is carefully hedged about with safeguarding provisions designed to prevent abuse.

The committees are unable to agree with the amendment to subdivision (b)(3). The illogic of excluding the evidence in nonhomicide criminal cases is evident. Thus, under the amendment, in a narcotics prosecution the dying declaration

of a gang member who had been "executed" would fail to qualify. Cognizance should be taken of the narrow subject-matter scope of the rule, as safeguarding against abuse.

The committees are unable to agree with certain of the amendments to subdivision (b)(4). The proposal to exclude declarations tending to expose the declarant to civil liability or to undermine a claim that he might assert does, it is true, leave declarations against "pecuniary" interest undisturbed in the rule. The latter is, however, apparently intended to be read in the narrow traditional English sense of an acknowledgement of a liquidated debt. The result is contrary to modern cases, including federal, extending the exception to admissions of tort and other unliquidated liabilities. See, e.g. Gichner v. Antonio Triano Tile and Marble Co., 133 U.S.App.D.C. 250, 410 F.2d 238 (1968) (statement that declarant had smoked in building later found burned, held sufficiently against interest). The proposal also fails to afford a satisfactory answer as to the admissibility of a confession of fault by a decedent in jurisdictions holding that privity between decedent and his administrator is lacking in wrongful death actions with the result that declarations of the decedent are denied the status of admissions. Insofar as the amendments exclude declarations tending to make the declarant an object of hatred, ridicule, or disgrace, the pattern of authority is, of course, much less apparent. It is believed, however, that these factors may furnish a motive more powerful than fear of punishment or financial loss.

The committees express no disagreement with the rephrasing in general of the corroboration requirement of subdivision (b)(4). They do suggest, however, deletion of the word "clearly" as imposing a burden beyond those ordinarily attending the admissibility of evidence, particularly evidence offered by defendants in criminal cases, and as providing a prolific source of disputes and appeals.

The committees express no disagreement with the proposed final sentence to be added to subdivision (b)(4). The wording may, however, invite confusion, and it is suggested that "not admissible" be replaced by "not within this exception." The result is consistent with the Subcommittee Note.

The committees disagree with the proposal to delete subdivision (b)(6) for the same reasons stated concerning the similar proposal to delete subdivision (24) of Rule 803.

RULE 901

(10) Methods provided by statute or rule.—Any method of authentication or identification provided by Act of Congress or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority.*

The committees express no disagreement with the language of the amendment to subdivision (10). See comment to Rule 402.

RULE 902

(4) Certified copies of public records.—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority.*

. . .

(8) Acknowledged documents.--Documents accompanied by a certificate of acknowledgment [under the hand and seal of] *executed in the manner provided by law by* a notary public or other officer authorized by law to take acknowledgments.

The committees express no disagreement with the language of the amendment to subdivision (4). See comment to Rule 402.

The committees agree with the amendment to subdivision (8).

RULE 1001

Rule 1001. Definitions

For purposes of this article the following definitions are applicable.

. . . . . .

(2) Photographs.—"Photographs" include still photographs, X-ray films, *video tapes*, and motion pictures.

The committees agree with the amendment to subdivision (2).

RULE 1101

(c) Rule of privilege.—The [rules] *rule* with respect to privileges [apply] *applies* at all stages of all actions, cases, and proceedings.

. . .

(e) Rules applicable in part.—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules [adopted] *prescribed* by the Supreme Court *under statutory authority*: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial *de novo* under section 706(2)(F) of title 5, United States Code; [review of orders of Secretary of Agriculture under sections 292, 499f and 499g (c) of title 7, United States Code; naturalization and revocation of naturalization under sections 1421–1429 of title 8, United States Code; prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of Secretary of the Interior under section 522 of title 15, United States Code; review of orders of

petroleum control boards under section 715d of title 15, United States Code; actions for fines, penalties, or forfeitures under the Tariff Act of 1930 (19 U.S.C., c. 4, part V), or under the Anti-Smuggling Act (19 U.S.C., c. 5); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C., c. 9); disputes between seamen under sections 256-258 of title 22, United States Code; habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside, or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 679 of title 46, United States Code; actions against the United States for damages caused by or for towage or salvage services rendered to public vessels under chapter 22 of title 46, United States Code, as implemented by section 7730 of title 10, United States Code.]

review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize associations of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code, motions to vacate, set aside, or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

The final form of subdivision (c) will depend upon action taken with regard to Rule 501.

The committees express no disagreement with the language of the amendment to subdivision (e). See the comment to Rule 402.

MATTERS OF STYLE

The committees suggest that the original numbering of the rules be retained, even though a rule or subdivision is deleted entirely. This would appear to be in order as a means of avoiding confusion with regard to the large body of legal literature (opinions, law review articles, texts) in which references to the rules as transmitted to the Congress are already found.

In order to conform to the usage followed in drafting the rules the committees also suggest use of "judge" rather than "court" unless the context clearly requires otherwise. See, e.g., the amendment to Rule 612.

PROPOSED SECTION 2 OF HR 5463

Sec. 2. Title 28 of the United States Code is amended—

(1) by inserting immediately after section 1656 the following new section:

"§ 1657. Rules of Evidence

"The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect."; and

(2) by adding at the end of the table of sections of chapter 111 the following new item:

"1657. Rules of Evidence."

The committees approve the proposal to add a section 1657 to title 28 U.S.C., which would confer upon the Supreme Court power to prescribe amendments to the Federal Rules of Evidence. After these rules have become effective by Act of Congress there will undoubtedly arise instances in which amendments will be found to be in the interest of justice and it will be very much in the public interest in this way to make it perfectly clear that the Court is empowered to deal with them. Likewise the committees are satisfied that it is appropriate to require that all such amendments be reported to the Congress and that they shall not take effect until a specified time has elapsed after they have been so reported, the exact length of that period of time being for the Congress to determine.

The proposed amendment further provides that if either House of Congress disapproves any rules amendment prescribed by the Supreme Court it shall not take effect. The committees understand the problem which this proposal is designed to meet but believe that it is unsound in principle and that it might in practice in some instances defeat a necessary exercise of the rule amending power which the section is designed to grant. It is suggested that the problem which the Subcommittee is seeking to meet could be taken care of adequately by a substitute provision that either

House of Congress should have authority by resolution to postpone the effective date of a rules proposal received from the Supreme Court for such a period of time as it might deem necessary to enable the Congress to give full consideration to it and to take action upon it.

The difficulty which the committees see in the proposal to give a single House of Congress veto power over rules proposals of the Court is that it would make it possible for one House to reject a rules amendment of which the other House approves, thus placing the Court in the impossible position of not being able to meet what might be an urgent problem except by a rule which would be destined for rejection by one House or the other. The committees believe that in a matter as vital to the proper administration of justice as procedural rulemaking, the Supreme Court, having been given primary responsibility, is entitled to have any action by the Congress in this field take the form of binding law, just as the Subcommittee is proposing to do in the case of the Federal Rules of Evidence, and not as a mere negative reaction from a single House.

It is believed, as suggested above, that both objectives, i.e., the need of each House of Congress to have ample time to consider and act upon rules amendments and the need of the Supreme Court, the bench and the bar to have the guidance of statutory law when the Congress acts in this area, will be met if each House is given independent

authority to postpone the effective date of a rules proposal prescribed by the Supreme Court for a period of time sufficient to enable both Houses to act on it.